

## AGREEMENT BETWEEN UNIVERSITY AND CONTRACTOR

This Agreement between University and Contractor ("Agreement") is made and entered into effective as of **March 1, 2012** (the "Effective Date"), by and between **Texas State University-San Marcos**, an agency and institution of higher education organized under the laws of the State of Texas ("University"), and **County of Tom Green** ("Contractor").

University and Contractor hereby agree as follows:

### 1. Scope of Work.

- a. The scope of the work ("Work") is set forth in **Exhibit A** attached and incorporated for all purposes. The schedule ("Schedule") for the Work is set forth in **Exhibit B** attached and incorporated for all purposes.
- b. Upon execution of this Agreement, all services previously performed by Contractor on behalf of University and included in the description of the Work, shall become a part of the Work and shall be subject to the terms and conditions hereof.
- c. Contractor shall obtain and make payment for any and all approvals, licenses, filings, registrations and permits required by federal, state or local law for the performance of the Work.
- d. If the Work includes providing any designs, drawings, specifications or information of any kind ("Work Product") for the use of others in the preparation, construction, manufacture, fabrication, installation, or purchase of any items described by the Work Product, then Contractor and University shall mutually agree on a cost for such items ("Budget") prior to the commencement of the Work if such items are not included in the Contract Amount (defined in **Exhibit C**). The performance of the Work by Contractor shall be responsive to and in conformance with the Budget. If the costs, as bid or negotiated, exceed the Budget, University shall have the option to:
  - (1) authorize an increase in the Budget;
  - (2) authorize rebidding or negotiation;
  - (3) authorize revisions to the Work Product at no additional cost to University.

If University selects option (3), Contractor will, without additional compensation and in a prompt and timely manner, revise its Work Product to achieve a cost that is within the Budget. The foregoing shall be in addition to, and not in lieu of, any remedies that University may have at law or in equity.

- e. University shall provide Contractor with a program ("Program") which includes University's requirements for the Work or for work by others which utilizes Contractor's Work Product. The Program may be a series of documents or other communications. Contractor shall, at all times, conform its Work to the requirements of the Program and to any other requirements of University.

2. **The Project.**

The Work, as more particularly set forth in **Exhibit A**, shall be provided in connection with the department's request and all other related, necessary and appropriate services (the "Project").

3. **Time for Commencement and Completion.**

The term of this Agreement shall commence on the Effective Date and terminate upon **August 31, 2012.**

It is understood that time is of the essence with regard to this Agreement and that Contractor shall complete all authorized Work to the satisfaction of University in accordance with the Program and the Schedule, and in a minimum of time consistent with the highest customs, standards, and practices of Contractor's business or profession. University shall have no obligation to accept late performance or to waive timely performance by Contractor.

4. **Contractor's Duties and Representations.**

- a. Notwithstanding anything to the contrary contained in this Agreement, University and Contractor agree and acknowledge that University is entering into this Agreement in reliance on Contractor's special and unique knowledge and abilities with respect to performing the Work. Contractor accepts the relationship of trust and confidence established between it and University by this Agreement. Contractor covenants with University to use its best efforts, skill, judgment, and abilities to perform the Work and to further the interests of University in accordance with University's requirements and procedures, in accordance with the highest standards of Contractor's profession or business and in compliance with all applicable national, federal, state and municipal, laws, regulations, codes, ordinances and orders and with those of any other body or authority having jurisdiction. Contractor warrants, represents, covenants, and agrees that there are no obligations, commitments, or impediments of any kind that will limit or prevent performance of the Work.
- b. Contractor warrants, represents, covenants, and agrees that all of the Work to be performed by Contractor under or pursuant to this Agreement shall be of the standard and quality which prevail among similar businesses and organizations of superior knowledge and skill engaged in providing similar services in major United States urban areas under the same or similar circumstances and involving an undertaking such as the Project.
- c. Contractor warrants, represents, covenants, and agrees that the Work will be accurate and free from any material errors. Contractor's duties as set forth herein shall at no time be in any way diminished by reason of any approval by University nor shall Contractor be released from any liability by reason of such approval by University, it being understood that University at all times is ultimately relying upon Contractor's skill and knowledge in performing the Work.

- d. Contractor warrants, represents, covenants, and agrees to maintain a staff of properly trained and experienced personnel to ensure satisfactory performance under this Agreement. The Contractor warrants, represents, covenants, and agrees that all persons connected with the Contractor directly in charge of the Work are duly registered and/or licensed under the laws, rules and regulations of any authority having jurisdiction, if so required by such laws, rules and regulations. Contractor shall assign to University a designated representative who shall be responsible for the administration and coordination of the Work. Contractor represents and agrees to furnish efficient business administration and coordination and perform the Work in an expeditious and economical manner consistent with the interests of University.
- e. Contractor warrants, represents, covenants, and agrees to call to University's attention all information in any reports, studies, plans, drawings, specifications, lists, computations, art work, sketches, models, data, photographs, tapes, renderings, publications, instructions, information, requirements, procedures and all other documentation and materials supplied to Contractor (by University or any other party) which it regards in its opinion as unsuitable, improper or inaccurate in connection with the purposes for which such documentation or material is furnished. Nothing shall excuse or detract from Contractor's responsibilities or obligations hereunder in a case where such documentation or material is furnished, unless Contractor advises University in writing that in its opinion such documentation or material and any requests made therein for action are unsuitable, improper or inaccurate and University confirms in writing that it wishes Contractor to proceed in accordance with the documentation and material as originally given.
- f. Contractor warrants, represents, covenants and agrees that it shall, at its own cost, correct any defects in the Work as soon as is practical after Contractor becomes aware of such defects or is notified of such defects. Should Contractor refuse or neglect to make good such defects within a reasonable time after receiving notice requesting such remedial work, then University shall be entitled to make good such defective Work at the expense of Contractor. This commitment by Contractor is in addition to, and not in substitution for, any other remedy for defective Work which University may have at law or in equity.
- g. Contractor warrants, represents, and agrees that if (i) it is a corporation or limited liability company, then it is a corporation duly organized, validly existing and in good standing under the laws of the State of Texas, or a foreign corporation or limited liability company duly authorized and in good standing to conduct business in the State of Texas, that it has all necessary corporate power and has received all necessary corporate approvals to execute and deliver the Agreement, and the individual executing the Agreement on behalf of Contractor has been duly authorized to act for and bind Contractor; or (ii) if it is a partnership, limited partnership, or limited liability partnership, then it has all necessary partnership power and has secured all necessary approvals to execute and deliver this Agreement and perform all its obligations hereunder; and the individual executing

this Agreement on behalf of Contractor has been duly authorized to act for and bind Contractor.

- h. Neither the execution and delivery of this Agreement by Contractor nor the performance of its obligation hereunder will result in the violation of any provision, if a corporation, of Contractor's articles of incorporation or by-laws, if a limited liability company, of its articles of organization or regulations, or if a partnership, by any partnership agreement by which Contractor is bound, or any agreement by which Contractor is bound or to the best of Contractor's knowledge and belief will conflict with any order or decree of any court or governmental instrumentality relating to Contractor.
- i. Except for the obligation of University to pay Contractor certain fees and expenses pursuant to the terms of this Agreement, University shall have no liability to Contractor or to anyone claiming through or under Contractor by reason of the execution or performance of this Agreement. Notwithstanding any obligation or liability of University to Contractor, no present or future partner or affiliate of University or any agent, officer, director, employee, or regent of University, The Texas State University System, or of the components comprising The Texas State University System, or anyone claiming under University has or shall have any personal liability to Contractor or to anyone claiming through or under Contractor by reason of the execution or performance of this Agreement.

5. **The Contract Amount.**

- a. So long as Contractor has provided University with its current and accurate Federal Tax Identification Number in writing, University shall pay Contractor in current funds for the performance of the Work, subject to adjustments, additional services and reimbursable expenses, if any, as set forth in **Exhibit C.**
- b. The Contract Amount includes any applicable federal, state or local sales or use tax payable on this transaction.

6. **Payment Terms.**

- a. Prior to ten (10) days before the end of each calendar month during the term of this Agreement, Contractor shall submit to University an application for payment (each a "Progress Payment") covering the services performed for University to that date, in accordance with **Exhibit C,** which application shall be accompanied by lien waivers and other forms, statements, invoices, and payroll reports that University may reasonably require to support the amount requested and to be submitted. University will, within thirty (30) days from the date it receives such application and supporting documentation for payment, approve or disapprove the amount reflected in such application and if University approves such amount or any portion of such amount, it shall promptly pay to Contractor the amount so approved, provided Contractor is not in breach of or in default under this Agreement. If University disapproves any amount requested by Contractor, University shall give Contractor specific reasons for its disapproval in writing.

- b. The cumulative amounts of all Progress Payments and the Final Payment (defined below) shall not exceed the Contract Amount as more particularly set forth in **Exhibit C**.
- c. Within ten (10) days after final completion of the Work and acceptance thereof by University or as soon thereafter as possible, Contractor shall submit a final request ("Final Request") which shall set forth all amounts due and remaining unpaid to Contractor and upon approval thereof by University, University shall pay ("Final Payment") to Contractor the amount due under such Final Request.
- d. Any provision hereof to the contrary notwithstanding, University shall not be obligated to make any payment (whether a Progress Payment or Final Payment) to Contractor hereunder if any one or more of the following conditions precedent exist:
  - (1) Contractor is in breach or default under this Agreement; or
  - (2) Any part of such payment is attributable to Work which is not performed in accordance with this Agreement; provided, however, such payment shall be made as to the part thereof attributable to Work which is performed in accordance with this Agreement.
- e. No partial payment made hereunder shall be or construed to be final acceptance or approval of that part of the Work to which such partial payment relates or relieve Contractor of any of its obligations hereunder with respect thereto.
- f. The acceptance of Final Payment shall constitute a waiver of all claims by Contractor except those previously made in writing and identified by Contractor as unsettled at the time of the Final Request for payment.
- g. University shall have the right to verify the details set forth in Contractor's billings, certificates, and statements, either before or after payment therefor, by (1) inspecting the books and records of Contractor at mutually convenient times; (2) examining any reports with respect to the Project; (3) interviewing Contractor's employees; (4) visiting any place where performance of all or a portion of the Project occurs; and (5) other reasonable action.

7. **Ownership and Use of Documents**

- a. All drawings, specifications, computations, sketches, data, photographs, tapes, renderings, models, publications, and other materials particular to the Work prepared by Contractor or Contractor's contractors and subcontractors ("Work Material"), are the property of University and for its exclusive use and re-use at any time without further compensation and without any restrictions.
- b. Except for such Work Material which is intended to be made public as part of the Project, Contractor shall treat all such Work Material as confidential, and Contractor shall neither use any such Work Material or copies thereof on other

work nor disclose such material or information to any other party without University's prior written approval.

8. **Default and Termination.**

- a. In the event of a material failure by a party hereunder to perform in accordance with the terms hereof, the other party may terminate this Agreement upon fifteen (15) days' written notice of termination setting forth the nature of the failure (the termination shall not be effective if the failure is fully cured prior to the end of the fifteen-day period), provided that, said failure is through no fault of the terminating party.
- b. University may, without cause, terminate this Agreement at any time upon giving seven (7) days' advance notice to Contractor. Upon termination pursuant to this Section, Contractor shall be entitled to payment of such amount as shall compensate Contractor for the services satisfactorily performed from the time of the last payment date to the termination date in accordance with this Agreement, provided that, Contractor shall have delivered to University such statements, accounts, reports and other materials as required by Section 8.d., and provided that, Contractor shall have delivered to University all reports, documents and other materials prepared by Contractor prior to the termination date. Notwithstanding any provision in this Agreement to the contrary, University shall not be required to pay or reimburse Contractor for any services performed or expenses incurred by Contractor after the date of the termination notice which could have been avoided or mitigated by Contractor.
- c. Termination under Sections 8.a. or 8.b. shall not relieve Contractor or any of its employees from liability for violations of this Agreement or any other act or omission of Contractor. The provisions of Sections 6.g., 9., 12.m., and 12.p. shall survive the termination of this Agreement. In the event of a termination under Sections 8.a. or 8.b., Contractor hereby consents to employment by University of a substitute contractor to complete the Work under this Agreement, with the substitute contractor having all rights and privileges of the original contractor for the Project. If Contractor is terminated pursuant to Section 8.a., and the cost to complete the Work exceeds the remaining balance of the Contract Amount as more particularly set forth in Exhibit C, then Contractor shall be liable to University and shall reimburse University on demand for the amount of such excess.
- d. As of the termination date of this Agreement, Contractor shall furnish to University all statements, accounts, reports, and other materials as are required hereunder or as have been prepared by Contractor in connection with its responsibilities hereunder. University shall have the right to use the ideas and designs therein contained for the completion of the Work or otherwise. In the event of termination of this Agreement or upon completion of the Work, University may, at all times, retain the originals of all such lists, publications, data, drawings, originals of renderings, special art work, or models. All such lists, publications, data, drawings, plans, specifications, renderings, models and other information are the property of University as described in Section 12.m. of this Agreement. They are not to be

used by any person other than University on other projects unless expressly authorized by University in writing.

- e. If Contractor fails to cure any default hereunder within fifteen (15) days after receiving written notice of such default, University shall be entitled (but shall not be obligated) to cure any such default and shall have the right to offset against all amounts due to Contractor hereunder, any and all reasonable expenses incurred in connection with such curative actions.

9. **Indemnification.**

- a. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL AND DOES HEREBY AGREE TO INDEMNIFY, PROTECT, DEFEND WITH COUNSEL APPROVED BY UNIVERSITY, AND HOLD HARMLESS UNIVERSITY AND THE TEXAS STATE UNIVERSITY SYSTEM, AND THEIR RESPECTIVE AFFILIATED ENTERPRISES, REGENTS, OFFICERS, DIRECTORS, ATTORNEYS, EMPLOYEES, REPRESENTATIVES AND AGENTS (COLLECTIVELY "INDEMNITEES") FROM AND AGAINST ALL DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, JUDGMENTS, EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES), AND OTHER CLAIMS OF ANY NATURE, KIND, OR DESCRIPTION (COLLECTIVELY "CLAIMS") BY ANY PERSON OR ENTITY, ARISING OUT OF, CAUSED BY, OR RESULTING FROM CONTRACTOR'S PERFORMANCE UNDER THIS AGREEMENT AND WHICH ARE CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT, NEGLIGENT OMISSION OR WILLFUL MISCONDUCT OF CONTRACTOR, ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY CONTRACTOR OR ANYONE FOR WHOSE ACTS CONTRACTOR MAY BE LIABLE. THE PROVISIONS OF THIS SECTION SHALL NOT BE CONSTRUED TO ELIMINATE OR REDUCE ANY OTHER INDEMNIFICATION OR RIGHT WHICH ANY INDEMNITEE HAS BY LAW.
  
- b. IN ADDITION, CONTRACTOR SHALL AND DOES HEREBY AGREE TO INDEMNIFY, PROTECT, DEFEND WITH COUNSEL APPROVED BY UNIVERSITY, AND HOLD HARMLESS INDEMNITEES FROM AND AGAINST ALL CLAIMS ARISING FROM INFRINGEMENT OR ALLEGED INFRINGEMENT OF ANY PATENT, COPYRIGHT, TRADEMARK OR OTHER PROPRIETARY INTEREST ARISING BY OR OUT OF THE PERFORMANCE OF SERVICES OR THE PROVISION OF GOODS BY CONTRACTOR PURSUANT TO THIS AGREEMENT, OR THE USE BY CONTRACTOR, OR BY INDEMNITEES AT THE DIRECTION OF CONTRACTOR, OF ANY ARTICLE OR MATERIAL; PROVIDED, THAT, UPON BECOMING AWARE OF A SUIT OR THREAT OF SUIT FOR SUCH INFRINGEMENT, UNIVERSITY SHALL PROMPTLY NOTIFY CONTRACTOR AND CONTRACTOR SHALL BE GIVEN FULL OPPORTUNITY TO NEGOTIATE A SETTLEMENT. CONTRACTOR DOES NOT WARRANT AGAINST INFRINGEMENT BY REASON OF UNIVERSITY'S DESIGN OF ARTICLES OR THE USE THEREOF IN COMBINATION WITH OTHER MATERIALS OR IN THE OPERATION OF ANY PROCESS. IN THE EVENT OF LITIGATION, UNIVERSITY AGREES TO COOPERATE REASONABLY WITH

CONTRACTOR AND ALL PARTIES SHALL BE ENTITLED, IN CONNECTION WITH ANY SUCH LITIGATION, TO BE REPRESENTED BY COUNSEL AT THEIR OWN EXPENSE.

- c. The indemnities contained herein shall survive the termination of this Agreement for any reason whatsoever.

10. **Limitation of Liability; No Consequential Damages**

- a. Except with respect to any obligations pursuant to Section 9 or University's compensation obligations set forth in the Agreement, neither party will have liability relating to this Agreement in an amount that exceeds the fees Contractor will receive from the University under this Agreement or for any special, consequential, incidental or exemplary damages or loss (nor any lost profits, savings or business opportunity).

11. **Independent Contractor.**

Contractor recognizes that it is engaged as an independent contractor and acknowledges that University shall have no responsibility to provide vacation, insurance or other fringe benefits normally associated with employee status. Contractor, in accordance with its status as an independent contractor, covenants and agrees that it shall conduct itself consistent with such status, that it will neither hold itself out as nor claim to be an officer, partner, employee or agent of University by reason hereof, and that it will not by reason hereof make any claim, demand or application to or for any right or privilege applicable to an officer, partner, employee or agent of University, including, but not limited to, unemployment insurance benefits, social security coverage or retirement benefits. Contractor hereby agrees to make its own arrangements for any of such benefits as it may desire and agrees that it is responsible for all income taxes required by applicable law.

12. **Insurance.**

- a. Contractor, consistent with its status as an independent contractor, shall carry at least the following insurance in such form, with such companies and in such amounts (unless otherwise specified) as University may require:
  - (1) Director and Officer Liability Insurance with coverage of not less than One Million Dollars (\$1,000,000) on an occurrence basis;
  - (2) Workers' Compensation Insurance with statutory limits, and Employer's Liability Insurance with limit of not less than One Million Dollars (\$1,000,000) per accident or disease. Policies must include All States Endorsement and a waiver of all rights of subrogation and other rights against the University;

- (3) Commercial General Liability insurance, including Blanket Contractual Liability, Broad Form Property Damage, Personal and Advertising Injury, Completed Operations/Products Liability, Medical Expenses, Interest of Employees as additional insureds and Broad Form General Liability Endorsements, for at least One Million Dollars (\$1,000,000) per occurrence on an occurrence basis; and
- (4) Comprehensive Automobile Liability insurance covering all owned, non-owned or hired automobiles to be used by Contractor, with coverage for at least One Million Dollars (\$1,000,000) Combined Single Limit Bodily Injury and Property Damage.

b. Contractor shall deliver to University:

- (1) Evidence satisfactory to University in its sole discretion, evidencing the existence of all such insurance promptly after the execution and delivery hereof and prior to the performance or continued performance of any services to be performed by Contractor hereunder from or after the date of this Agreement; and
- (2) Additional evidence, satisfactory to University in its sole discretion, of the continued existence of all such insurance not less than thirty (30) days prior to the expiration of any such insurance. If, however, Contractor fails to pay any of the renewal premiums for the expiring policies, University shall have the right to make such payments and set-off the amount thereof against the next payment coming due to Contractor under this Agreement.

Such insurance policies, with the exception of Workers' Compensation and Employer's Liability, shall name and such evidence shall reflect University as an Additional Insured and shall provide that the policies will not be canceled until after thirty (30) days' unconditional written notice to University, giving University the right to pay the premium to maintain coverage, in which event Section 11.b.(2) shall apply.

c. The insurance policies required in this Agreement shall be kept in force for the periods specified below:

- (1) Director and Officer Liability Insurance, Employer's Liability Insurance, Commercial General Liability Insurance and Comprehensive Automobile Liability Insurance shall be kept in force until receipt of Final Payment by Contractor; and
- (2) Workers' Compensation Insurance shall be kept in force until the Work has been fully performed and accepted by University in writing.

13. **Miscellaneous.**

- a. **Assignment.** This Agreement is a personal service contract for the services of Contractor, and Contractor's interest in this Agreement, duties hereunder and/or fees due hereunder may not be subcontracted, assigned or delegated to a third party, in whole or in part, and any attempt to do so shall be void and of no effect. The benefits and burdens of this Agreement are, however, assignable by University.
- b. **Texas Family Code Child Support Certification.** Pursuant to Section 231.006, *Texas Family Code*, Contractor certifies that it is not ineligible to receive the award of or payments under this Agreement and acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate.
- c. **Eligibility Certification.** Pursuant to Section 2155.004, *Texas Government Code*, Contractor certifies that the individual or business entity named in this Agreement is not ineligible to receive the award of or payments under this Agreement and acknowledges that this Agreement may be terminated and payment withheld if this certification is inaccurate.
- d. **Franchise Tax Certification.** A corporate or limited liability company Contractor certifies that it is not currently delinquent in the payment of any Franchise Taxes due under Chapter 171 of the *Texas Tax Code*, or that the corporation or limited liability company is exempt from the payment of such taxes, or that the corporation or limited liability company is an out-of-state corporation or limited liability company that is not subject to the Texas Franchise Tax, whichever is applicable.
- e. **Payment of Debt or Delinquency to the State.** Pursuant to Sections 2107.008 and 2252.903, *Texas Government Code*, Contractor agrees that any payments owing to Contractor under this Agreement may be applied directly toward any debt or delinquency that Contractor owes the State of Texas or any agency of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full.
- f. **Products and Materials Produced in Texas.** Contractor covenants and agrees that as required by Section 2155.4441, *Texas Government Code*, in performing the Work and its other duties and obligations under this Agreement, the Contractor shall purchase products and materials produced in Texas when such products and materials are available at a price and delivery time comparable to products and materials produced outside of Texas.
- g. **Loss of Funding.** Performance by University under this Agreement may be dependent upon the appropriation and allotment of funds by the Texas State Legislature (the "Legislature") and/or allocation of funds by the Board of Regents of The Texas State University System (the "Board"). If the Legislature fails to appropriate or allot the necessary funds, or the Board fails to allocate the necessary funds, then University shall issue written notice to Contractor and University may terminate this Agreement without further duty or obligation

hereunder. Contractor acknowledges that appropriation, allotment, and allocation of funds are beyond the control of University.

- h. **Entire Agreement; Modifications.** This Agreement supersedes all prior agreements, written or oral, between Contractor and University and shall constitute the entire agreement and understanding between the parties with respect to the subject matter hereof. This Agreement and each of its provisions shall be binding upon the parties and may not be waived, modified, amended or altered except by a writing signed by University and Contractor.
- i. **Force Majeure.** Neither party hereto shall be liable or responsible to the other for any loss or damage or for any delays or failure to perform due to causes, beyond its reasonable control including, but not limited to, acts of God, strikes, epidemics, war, riots, flood, fire, sabotage, or any other circumstances of like character. Provided, however, Contractor shall be liable and responsible to University for all loss and damage suffered by University for any and all delays in performance of or failures to perform Contractor's duties and obligations under the terms of this Agreement which are directly or indirectly related to the Year 2000 Problem.
- j. **Captions.** The captions of sections and subsections in this Agreement are for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction.
- k. **Governing Law.** This Agreement and all of the rights and obligations of the parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of Texas.
- l. **Waivers.** No delay or omission by either of the parties hereto in exercising any right or power accruing upon the non-compliance or failure of performance by the other party hereto of any of the provisions of this Agreement shall impair any such right or power or be construed to be a waiver thereof. A waiver by either of the parties hereto of any of the covenants, conditions or agreements hereof to be performed by the other party hereto shall not be construed to be a waiver of any subsequent breach thereof or of any other covenant, condition or agreement herein contained.
- m. **Proprietary Interests; Confidentiality.** Contractor agrees that all reports, studies, plans, models, drawings, specifications, and any other information or data of any type relating to its activities hereunder, whether or not any of the same is accepted or rejected by University, shall remain the property of University and shall not be used or published by Contractor or any other party without the express prior consent of University. In implementation of the foregoing, Contractor hereby grants and assigns to University all rights and claims of whatever nature and whether now or hereafter arising in and to any and all of such reports, studies, plans, models, drawings, specifications, and other information or data and shall cooperate fully with University in any steps University may take to obtain copyrights, trademark or like protections with respect thereto.



with copy to: W. Scott Erwin  
Director, Office of Sponsored Programs  
Texas State University-San Marcos  
601 University, JCK 440  
San Marcos, Texas 78666

If to Contractor: Tom Green Sheriff's Office  
222 West Harris  
San Angelo, Texas 76903

or such other person or address as may be given in writing by either party to the other in accordance with the aforesaid.

- r. **Severability.** In case any provision hereof shall, for any reason, be held invalid or unenforceable in any respect, such invalidity or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid or unenforceable provision had not been included herein.
- s. **Enforcement.** It is acknowledged and agreed that Contractor's services to University are unique, which gives Contractor a peculiar value to University and for the loss of which University cannot be reasonably or adequately compensated in damages; accordingly, Contractor acknowledges and agrees that a breach by Contractor of the provisions hereof will cause University irreparable injury and damage. Contractor, therefore, expressly agrees that University shall be entitled to injunctive and/or other equitable relief in any court of competent jurisdiction to prevent or otherwise restrain a breach of this Agreement, but only if University is not in breach of this Agreement.
- t. **Dispute Resolution.** (1) To the extent that Chapter 2260, *Texas Government Code*, as it may be amended from time to time ("Chapter 2260"), is applicable to this Agreement and is not preempted by other applicable law, the dispute resolution process provided for in Chapter 2260 shall be used, as further described herein, by University and Contractor to attempt to resolve any claim for breach of contract made by Contractor:

(A) Contractor's claims for breach of this Agreement that the parties cannot resolve pursuant to other provisions of this Agreement or in the ordinary course of business shall be submitted to the negotiation process provided in subchapter B of Chapter 2260. To initiate the process, Contractor shall submit written notice, as required by subchapter B of Chapter 2260, to University in accordance with the notice provisions in this Agreement. Contractor's notice shall specifically state that the provisions of subchapter B of Chapter 2260 are being invoked, the date and nature of the event giving rise to the claim, the specific contract provision that University allegedly breached, the amount of damages Contractor seeks, and the method used to calculate the damages. Compliance by Contractor with subchapter B of Chapter 2260 is a required prerequisite to Contractor's filing of a contested case proceeding under subchapter C of Chapter 2260. The Chief Business Officer of

University, or such other officer of University as may be designated from time to time by University by written notice thereof to Contractor in accordance with the notice provisions in this Agreement, shall examine Contractor's claim and any counterclaim and negotiate with Contractor in an effort to resolve such claims.

(B) If the parties are unable to resolve their disputes under subparagraph (A) of this Section, the contested case process provided in subchapter C of Chapter 2260 is Contractor's sole and exclusive process for seeking a remedy for any and all of Contractor's claims for breach of this Agreement by University.

(C) Compliance with the contested case process provided in subchapter C of Chapter 2260 is a required prerequisite to seeking consent to sue from the Legislature under Chapter 107 of the Texas Civil Practices and Remedies Code. The parties hereto specifically agree that (i) neither the execution of this Agreement by University nor any other conduct, action or inaction of any representative of University relating to this Agreement constitutes or is intended to constitute a waiver of University's or the state's sovereign immunity to suit and (ii) University has not waived its right to seek redress in the courts.

(2) The submission, processing and resolution of Contractor's claim is governed by the published rules adopted by the Texas Attorney General pursuant to Chapter 2260, as currently effective, hereafter enacted or subsequently amended.

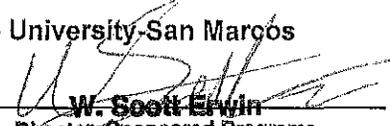
(3) Neither the occurrence of an event giving rise to a breach of contract claim nor the pendency of a claim constitute grounds for the suspension of performance by Contractor, in whole or in part. University and Contractor agree that any periods set forth in this Agreement for notice and cure of defaults are not waived.

- u. **Records.** Records of Contractor's costs, reimbursable expenses pertaining to the Project and payments shall be available to University or its authorized representative during business hours and shall be retained for four (4) years after final Payment or abandonment of the Project, unless University otherwise instructs Contractor in writing.
- v. **Notices.** All notices, consents, approvals, demands, requests or other communications provided for or permitted to be given under any of the provisions of this Agreement shall be in writing and shall be deemed to have been duly given or served when delivered by hand delivery or when deposited in the U.S. mail by registered or certified mail, return receipt requested, postage prepaid, and addressed as follows:

IN WITNESS WHEREOF, University and Contractor have executed and delivered this Agreement as a sealed instrument effective as of the Effective Date.

**UNIVERSITY:**

Texas State University-San Marcos

Signature: 

Name: W. Scott Erwin  
Director, Sponsored Programs  
Texas State University-San Marcos  
601 University

Title: San Marcos, Texas 78666  
512-245-2102 FAX (512) 245-1822

Date: 2/7/12

**CONTRACTOR:**

County of Tom Green, TX Sheriff's Office

Signature: 

Name: Truman Richey

Title: Sheriff

Date: 01/31/12

**Attach:**

- EXHIBIT A - Scope of Work**
- EXHIBIT B - Schedule**
- EXHIBIT C - Payment for Services**

## EXHIBIT A

### SCOPE OF WORK

The Contractor shall diligently render the following performance:

Contract funds shall be used to support the enforcement activities and additional programs requirements outlined in 1-4 of Exhibit A, Scope of Work. Contractor shall meet the assigned minimum performance measures assigned in Exhibit B.

#### 1. Enforcement Activities

Contractor shall:

- a) Conduct Controlled Buy/Stings of tobacco retailers using minors as decoys, to determine compliance with applicable laws in accordance with **Health and Safety Code §161.082 – Sale of cigarettes or tobacco products to persons younger than 18 years of age prohibited: Proof of age required**. Refer to Exhibit B Schedule – Performance Measures, for the number of Controlled Buy/Stings to be conducted by your agency.
- b) Record the results of the Controlled Buy/Stings conducted using the Texas Department of State Health Services Cigarette and Tobacco Controlled Buy/Sting Report form provided by the Texas School Safety Center at Texas State University-San Marcos.
- c) Use non-smoking male and female minors ages 14 – 16 in accordance with **Health and Safety Code, Chapter 161.088 – Enforcement; Announced Inspections**.
- d) Use the State Comptroller of Public Accounts most recent Tobacco Permitted Retail Outlet List for the Controlled Buy/Stings to obtain Retail Outlet name, address, and tobacco permit numbers.
- e) Select the Tobacco Permitted Retail Outlets that will receive a Controlled Buy/Sting based on the following criteria:
  1. High retail density
  2. Low socio-economic areas
  3. High risk areas
  4. Local historical perspective of previous sales to minors and/or complaints received

- f) Conduct follow-up inspections of retail outlets found to be in violation of state and local laws. Follow-up inspections shall be conducted within two to ten (2-10) days of original inspection and in the same manner as the original inspection.
- g) Conduct follow up inspections on complaints regarding retailer and/or other violations received on the state's 1-800 tobacco hotline.

## 2. Training Activities

Contractor shall:

- 1) Assign a minimum of two (2) agency representatives to participate in a live web-based training session conducted by Texas School Safety Center. Representatives shall include the person(s) assigned to the implementation of the contract activities, and/or the line supervisor overseeing the day-to-day activities of this contract, and the person(s) conducting the enforcement outlined in Exhibit A, Scope of Work.
- 2) Participate in any and all ongoing technical assistance and training activities offered by the Texas School Safety Center at Texas State University-San Marcos.

## 3. Reporting Requirements

Contractor shall:

- 1) Submit a monthly activity summary report for the enforcement activities conducted, using the Monthly Summary and Invoice form provided by the Texas School Safety Center at Texas State University-San Marcos.
- 2) Provide monthly a short summary of challenges and obstacles encountered in the course of conducting Controlled Buys/Stings using minors for each performance reporting period, using the Monthly Summary and Invoice form provided by the Texas School Safety Center at Texas State University-San Marcos.
- 3) Submit the Monthly Summary and Invoice form to include the number of Controlled Buy/Stings conducted and Citations issued within the performance reporting period. Controlled Buy/Stings conducted as part of a Follow-up shall also be included in the total of Controlled Buys/Stings conducted.
- 4) Submit billing information for services provided in the invoice section of the Monthly Summary and Invoice. Payment amount for services is outlined in Exhibit C, Payment for Services. The Monthly Summary and Invoice form shall be signed by the designated authorized official.

- 5) The Monthly Summary and Invoice form shall be submitted to the Texas School Safety Center on the 4th of the month for activities of the previous month. The report may be mailed or faxed to the Texas School Safety Center, 350 N. Guadalupe – Suite 140, PMB 164, San Marcos, Texas 78666. Fax # 512-245-1133.
- 6) Texas School Safety Center will provide violation information to the Comptroller of Public Accounts as required by law, (Health & Safety Code, Section 161.090 Reports of Violation) by the 10th working day of the month for activity of the previous month.

#### **4. Additional Program Requirements**

Contractor shall:

- 1) Assign a minimum of one (1) agency representative to the implementation of the activities of this contract, and provide the name(s) of any key personnel changes that impact the requirements of this contract.
- 2) Coordinate enforcement activities with other law enforcement agencies in the area. Coordination of services shall include but not limited to resources such as officers and minor decoys to maintain integrity of the undercover operation in testing compliance with tobacco sales to minors.
- 3) Contractor shall maintain specific, detailed supporting documentation of all programmatic records used in the course of conducting the Controlled Buy/Stings for a minimum of 4 years.

## EXHIBIT B

### SCHEDULE

#### PERFORMANCE MEASURES

The following performance measures will be used to measure compliance with the services rendered as described in Exhibit A, Scope of Work without waiving the enforceability of any of the other terms of the contract.

The minimum number of activities for this contract period shall include the following:

- Number of Controlled Buys/Stings using minors as decoys: 119
- A performance measure will not be assigned for follow-up of Controlled Buys/Stings as a result of local perspective of previous sales to minors and/or complaints received. However, contractor is required to conduct follow-up of retail outlets not in compliance and report the activity monthly.
- Contractor shall follow the Contractor's Program Work Plan monthly goal pre-established upon inception of the contract. The Contractor's Program Work Plan outlines monthly goals for your agency to follow from March 2012 to August 2012.
- Deviation from the pre-established Contractor's Program Work Plan requires prior approval.

## EXHIBIT C

### PAYMENT FOR SERVICES – STRATUM B COUNTIES

#### SERVICE FEES:

- Payment for fees will be based on the receipt and approval of an invoice for services. Payments will be made according to the following schedule:
- Contractor shall be paid monthly upon submission of Parts 1-5 of the Monthly Summary and Invoice form and attachments as confirmation of services rendered.
- Contractor shall record the number of Controlled Buy/Stings conducted and attach complete Cigarette and Tobacco Controlled Buy/Sting Report forms for each Controlled Buy/Sting conducted for the Performance Reporting Period. The total activity reported shall correspond to the pre-established monthly goal listed in the Contractor's Program Work Plan.
- Total contract amount includes funds for conducting Controlled Buy/Stings at 100 percent of the permitted tobacco outlets in the county. Contractor may as needed allocate up to 25 percent of the funds for the purpose of conducting Controlled Buy/Stings in retail locations needing additional enforcement due to: 1) repeated violations, 2) knowledge of historical perspective of previous sales to minors, and/or 3) complaints received where a follow-up is needed.
- Contractor shall be paid \$75.00 for each correct and completed Controlled Buy/Sting reported on the Cigarette and Tobacco Controlled Buy/Sting Report form. All costs incurred for the purpose of conducting a complete Control Buy/Sting are the responsibility of the contractor. In order to receive full payment for the Controlled buy/Stings including follow-ups billed for each performance reporting period, a completed Cigarette and Tobacco Controlled Buy/Sting Report must be attached for each.
- The Monthly Summary and Invoice form shall be reviewed by the 15<sup>th</sup> of the month and submitted for payment if information included in the report and attachments are correct. Payment shall be subject to laws of the State of Texas including Prompt Payment.

All invoices shall be sent to:

Chad Nolte  
Law Enforcement Contract Specialist  
Tobacco Prevention & Community Services  
Texas School Safety Center  
Texas State University-San Marcos

350 N. Guadalupe, Suite 140, PMB 164  
San Marcos, Texas 78666

Notwithstanding the foregoing, the cumulative amount of Service Fees remitted by University to Contractor shall not exceed \$8,925.00 ("Fee Cap") without the prior written approval of University. In addition, total fees for each Phase of the Work shall not exceed the following specified amounts without the prior written approval of University:

**ADDITIONAL SERVICES NOT NAMED IN THIS CONTRACT:**

If University submits, in advance, a written request for additional services not contemplated or reasonably inferred by this Agreement, Contractor shall be paid for additional services at a rate negotiated by University and Contractor prior to implementation of additional services in a separate contract.

Contractor will not be reimbursed for any material and supply expenses associated with this work. Any material and supplies required for the study are to be requested through the university contact.